

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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MARK GEOGHEGAN and  
HEATHER GEOGHEGAN,

Plaintiffs,

v.

PROGRESSIVE CASUALTY  
INSURANCE COMPANY,

Defendant.

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**DECISION AND ORDER**

17-CV-00008-JJM

Before the court is defendant Progressive's motion [43] seeking reconsideration of that portion of my January 5, 2018 Decision and Order [37] directing production of Progressive's information as to reserves in this action. Familiarity with that Decision and Order, and with my February 22, 2018 Order to Show Cause [45], is presumed.

As discussed in my Order to Show Cause, while I disagree with the reasoning of Schwimmer v. Allstate Insurance Co., 176 F.3d 648 (2d Cir. 1999), it is controlling law.

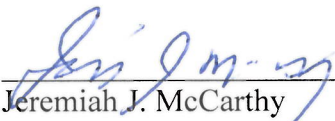
Therefore, absent a claim for consequential damages, the only issue in this case is the amount of Supplemental Underinsured Motorist benefits to which plaintiffs are entitled under their policy with Progressive, which will be determined by the trier of fact. Progressive's reserves are irrelevant to that issue.

Although plaintiffs previously stated that they "are not seeking . . . consequential damages in the within matter" (plaintiffs' letter brief [33], p. 4), they now reverse themselves and state that they "will have consequential damages for lost wages and travel mileage". Plaintiffs' letter brief [46], p. 4). However, litigants may not "freely tak[e] inconsistent positions in a lawsuit and simply ignor[e] the effect of a prior filed document". United States v. Allstate

Insurance Co., 2014 WL 10748104, \*7 (W.D.N.Y. 2014), adopted, 2016 WL 463732 (W.D.N.Y. 2016), aff'd, 686 Fed. App'x 23 (2d Cir. 2017).

Therefore, Progressive's motion for reconsideration [43], is granted, and my January 5, 2018 Decision and Order [37] is modified to the extent of deleting the requirement that Progressive furnish plaintiffs with information concerning its reserves. A conference to discuss modifications (if any) to the Amended Case Management Order [42] will be held on June 1, 2018 at 2:00 pm. Counsel may participate in person or by telephone upon advance notice to chambers. For those electing to participate by telephone, the call-in number has recently changed. Please dial (703) 724-3100, enter access code 4100030#, and then pin 9999#.

Dated: May 24, 2018

  
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Jeremiah J. McCarthy  
United States Magistrate Judge